UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

IGT d/b/a INTERNATIONAL GAME TECHNOLOGY Respondent, and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION 501, AFL-CIO Charging Party.	Case Nos. 28-CA-166915 28-CA-173256 28-CA-17 4003 28-CA-174526

POST-HEARING BRIEF ON BEHALF OF RESPONDENT

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I. PRELIMINARY STATEMENT

Respondent IGT respectfully submits this post hearing brief in support of its position that it has not violated the Act as alleged by the General Counsel ("GC") in the Consolidated Complaint or the proposed amendment to the Consolidated Complaint. The original Consolidated Complaint alleges three (3) distinct unfair labor practices:

1) Non-Disparagement Clause: Since June 30, 2015, IGT has maintained an unlawfully overbroad non-disparagement provision in its Separation Agreement; GC Ex.1(v) ¶¶ 5, 7.

2) Information Requests: Since April 13, 2016, IGT (through Cindy Hartman), in writing, failed and refused to provide the International Union of Operating Engineers, Local 501 ("Union)" with a) "a list of all company locations", and b) wage scales for technicians in all jurisdictions where IGT and GTECH conducts business. Id. ¶¶ 6(g), (i), 8.

3) Using Temporary Contractors to Supplement the Bargaining Unit on the Stations Project: IGT failed and refused to bargain in good faith over the use of an outside vendor to supply temporary contractors to supplement the bargaining unit employees on the "Stations Project[1]." Id. ¶¶ 6(k)-(m), 8.[2]

At the opening of the hearing on June 29, 2016, without any prior notice or underlying Charge, the GC sought leave to add the following two (2) new additional distinct allegations to

[1] Some witnesses also interchangeably referred to this as the "UGA Project". The UGA Project and the Stations Project are the same thing.

[2] The GC also alleged in the Consolidated Complaint that IGT made an unlawful unilateral change by using a third-party vendor to direct ship materials from IGT's facility to its worksite, thereby changing the manner in which employees in the Unit performed their duties, including unloading of games. Id. Par 6(j). At the opening of the hearing, the GC voluntarily withdrew that allegation.

the original Consolidated Complaint:[3]

1) "About May 4, 2016, IGT, by legal counsel, at IGT's facility, threatened employees with the loss of benefits because they engaged in collective bargaining." GC 1(ac) ¶ 5(b).

2) "About May 4, 2016, IGT, by legal counsel, at IGT's facility, bypassed the union and dealt directly with its employees in the unit by discouraging them from collective-bargaining over terms and conditions of employment. GC (1(ac) ¶ 6(j).

As set forth herein, the GC has failed to satisfy his burden to prove the claims alleged in the Consolidated Complaint and the new allegations in the proposed amendment to the Consolidated Complaint. In each instance, as set forth in detail herein, multiple legal and factual reasons exist to dismiss the allegations as presented. In summary, the allegations should be dismissed for the following grounds:

1) Non-Disparagement Clause: The record evidence did not establish that the Separation Agreement was ever given or shown to any employee of IGT. To the extent that it was given to a former employee who was lawfully separated from IGT, the Act does not cover such agreements. Further, the record evidence establishes that IGT amended the non-disparagement language as of January 25, 2016, and the amended non-disparagement language conforms identically with the language recently found to be lawful by the Board in *Pratt, LLC*, 360 NLRB No. 48, p. 21 (2014).

2) Information Requests: IGT is an international business, which the Union

[3] The next day, on June 30, the GC withdrew the first proposed amendment, and sought to substitute it with another proposed amendment which added additional factual allegations. The GC's second amendment inaccurately claims that it was proposed the day earlier, on June 29, at the start of the hearing, which is not the case. See GCX Ex. 1(ac).

acknowledged at the hearing. A request for all locations IGT does business, or the wage scales for technicians in all locations IGT does business, are not presumptively relevant and are clearly overbroad. Indeed, the Union conceded at the hearing that they did not even want all the information they requested. Rather, they wanted a narrower scope of information. However, when IGT asked the Union to explain why they wanted a list of all locations, the Union never responded. IGT engaged the Union in a similar process regarding the wage scales. As opposed to the location request, dialogue did occur between the Parties, and IGT provided information to the Union. The Union never responded that they wanted anything additional. At the hearing, the Union claimed that there were additional questions about the information they wanted to ask IGT. However, they conceded that prior to the hearing they never did so.

3) Use of Temporary Contractors to Supplement the Bargaining Unit on the Stations Project: IGT has a long-standing relationship with the vendor AppleOne to supply temporary Material Handlers on an as needed basis. This relationship pre-dated the Union by many years. In or about April 2016, IGT was hired to service approximately 10,000 slot machines over an approximately 3-month period. It is undisputed that the timeline was dictated by the client, and as a result, this project was beyond the capacity of the existing bargaining unit. The testimony established that for logistics reasons – not labor cost considerations – IGT decided not to hire any new temporary employees for the Stations Project. It is further undisputed that the bargaining unit was fully maximized, including overtime, before using any temporary contractors, and since IGT was not going to hire temporary employees, the Stations Project had zero impact on the bargaining

unit.[4] Accordingly, IGT did not have an obligation to bargain over the decision to use AppleOne temporary contractors to supplement the bargaining unit on the Stations Project, or the effect thereof. Further, to the extent that a duty to bargain existed, the record evidence reveals IGT repeatedly offered, in writing and verbally, to bargain with the Union. Indeed, the record reveals that IGT implemented every request that Union made regarding the existing bargaining unit.

Similarly, regarding the two new proposed allegations introduced at the hearing, in addition to the impropriety of the proposed amendment, the record evidence failed to establish either claim. A necessary component of proving direct dealing is that the interaction be to the exclusion of the Union. See *El Paso, Electric Co.* 355 NLRB 544, 545 (2010). Here, it is undisputed that any communications that may have been directed at the two members of the Union's bargaining committee - the self-titled Shop Stewards who were active participants in collective bargaining - occurred at the bargaining table in front of, and as part of a conversation with, the Union. Equally, there is no record evidence that anyone from IGT threatened any employee with the loss of benefits because they engaged in collective bargaining. While the testimony varied regarding what was in fact said, all of the GC's witnesses confirmed that the nature of the communication was related to trying to convince the Union not to walk out of the bargaining session and to continue bargaining. Not one witness testified that anyone from IGT said anything that could even arguably be interpreted as a threat of the "loss of benefits <u>because</u> they engaged in collective bargaining."

Accordingly, for the reasons set forth herein, IGT respectfully submits that the

[4] No work was removed from the unit, there was no change in job duties or skill set, schedules were not changed, and the unit members had the opportunity to work overtime after their responsibilities were covered.

Consolidated Complaint and the proposed amendment be dismissed in their entirety.

II. STATEMENT OF FACTS

For the Judge's convenience, the following is a list of individuals who are referenced in the record, including the witnesses whose testimony is referenced herein:

- Cindy Hartman ("Hartman"), Director of HR Services and Employment and Labor Relations for IGT, Tr. 35:10-11
- Shondra Deloach-Perea ("Deloach-Perea"), Field Services Director for the Pacific Region for IGT, Tr. 134:11
- Julie Doti ("Doti"), Director of Human Resources for Global Field Services, Tr. 188:22-23
- Theo Gould ("Gould"), attorney for IGT
- Tom O'Mahar ("O'Mahar"), Lead Negotiator for the Union, Soto, Tr. 204.
- Jose Soto ("Soto"), Director of Organizing for the Union, Tr. 200:5
- Juan Robles ("Robles"), bargaining unit member and Union bargaining team representative, Tr. 376:25, 391:24-393:6
- Shane West ("West"), bargaining unit member and Union bargaining team representative, Tr. 412:12, 428:15-429:24

A. Union Certification

On or about April 7, 2015, GTECH acquired IGT, which merged into a single company and adopted the trade name IGT. Hartman, Tr. 36:17-25. On May 26, 2015, the Board certified the International Union of Operating Engineers, Local 501, as the bargaining unit representative of all full-time and regular part-time technicians employed by IGT at its Las Vegas, Nevada facility. Compl., ¶ 6(b). On June 16, 2015, the Union sent IGT a letter "insisting that [IGT] make no unilateral **changes** with respect to the terms and conditions of employment of any

employee in the bargaining unit without affording an opportunity to this union to bargain over the effects of such change." GC Ex. 4 (emphasis added). Thereafter, the Union provided several examples of changes it insisted could not be made without bargaining. *Id.* The Union concluded with the demand that "any wage increases or benefit increases which would have normally occurred without the union [] should be implemented in the normal course of business." *Id.* In other words, the Union insisted that IGT preserve the status quo with respect to the bargaining unit's terms and conditions of employment, and bargain only over changes to that status quo. *Id.*

B. Collective Bargaining History

After certification, the parties met to negotiate in October 2015. Hartman Tr. 41. Because the bargaining teams for both the Union and IGT included individuals who were based outside of Las Vegas, the parties started scheduling two-day bargaining sessions. Soto Tr. 244-45. The next meetings were held on January 27 and 28, 2016. Soto Tr. 247. At that time, the parties agreed that part of the second day of each meeting would be dedicated to discussing interim issues. Soto, Tr. 247-48; Hartman, Tr. 41:24-43:8. Tom O'Mahar, the lead negotiator for the Union, would leave approximately mid-way through the second scheduled day, and Soto would take over negotiations on behalf of the Union, along with West and Robles, the bargaining team representatives from the bargaining unit itself. Soto, Tr. 245-48. During these meetings, while Soto was the lead Union negotiator, it was common at the bargaining table for IGT and Gould to speak directly with Robles and West because they were active members of the Union's bargaining team, and for Robles and West to provide input directly to IGT and Gould about the issues being discussed. Soto, Tr. 245:1-246:8. Robles, Tr. 391:24-393:6. West, Tr. 428:15-429:24. After each two-day session was completed, Cindy Hartman summarized the issues that were discussed and emailed the summary to Soto.

Subsequent bargaining sessions were held on March 16, 17, and May 3, 4.

C. The Stations Project

1. March 17, 2016 Bargaining Meeting Between IGT And The Union

During the March 17, 2016 meeting, IGT told the Union that it would likely soon be contracting with Stations Casinos to install universal gaming adapters ("UGAs") into select Stations' gaming machines. Hartman Tr. 43:8-44:8. Deloach-Perea, Tr. 136:14-24. Robles, Tr. 378:16-25. During this meeting, IGT discussed the scope of the upcoming project. IGT explained that it would be using temporary Material Handlers from a third-party contractor (AppleOne) to supplement the bargaining unit as it had for past projects because the project exceeded IGT's capacity within the client's anticipated timeline without the additional labor. Hartman Tr. 44:9-16, 48:17-24. Deloach-Perea, Tr. 137:5-138:22. Robles, Tr. 393:7-16. West, Tr. 416:1-7.[5]

IGT's contract with AppleOne for temporary laborers dated back to March 31, 2011. Resp. Ex. 17. As explained by Hartman, "I have been an employee of IGT for over five and a half years. Since the day I started, the company has had an ongoing contract with AppleOne for temporary workers." Tr. 59:12-15. Similarly, Deloach-Perea testified that she has been employed by IGT for eight years "and in those eight years we've used [AppleOne] for temporary labor." Deloach-Perea, Tr. 456:17-21. *See also* Deloach-Perea, Tr. 154:10-12. Hartman specifically testified that IGT used AppleOne Material Handlers on temporary projects before the bargaining unit was certified, explaining that in 2015 IGT used AppleOne to "work in the depot area" and again in 2014, there was specific work [completed by AppleOne temporary workers]

[5] Soto confirmed that IGT told the Union at this meeting about the Stations Project, that it would be with Stations Casinos, and that it would use a third party contractor, AppleOne, to obtain temporary Material Handler laborers. Soto, Tr. 205:12-15, 209:21-210:1. Deloach-Perea testified that a Material Handler's duties include unloading and loading parts, placing parts, boxing parts, placing/installing parts into games, removing parts from games, putting parts on shelves, and installation and removal of games. Deloach-Perea, Tr. 138:7-15, 166:10-22. However, Soto did not ask IGT during the March 17 meeting to explain the exact duties that an AppleOne Material Handler would be performing.

on a separate station's project." Tr. 77:1-5. Deloach-Perea further clarified that IGT used AppleOne to provide temporary Material Handlers for a project in 2014 at the Sunset Station Casino. Tr. 166:3-22. On that project, the AppleOne Material Handlers removed and installed parts and casino gaming machines, similar to what they did on the Stations Project. *Id.* *See also* Deloach-Perea, Tr. 173:4-10, 467:17-468:4. Deloach-Perea also testified that AppleOne temporary Material Handlers have been assisting IGT in Las Vegas for years with testing equipment and with installing and removing slot machines and other products for IGT during the annual gaming show convention at the convention center. Deloach-Perea, Tr. 469:7-470:17, 478:16-479:12. Indeed, as Hartman explained, "It has been [IGT's] past practice to utilize technicians for work throughout varying parts of the country.… It is status quo." Tr. 99:6-14.

Further, the decision to use AppleOne temporary labor to supplement the bargaining unit was not based on labor cost considerations.[6] Deloach-Perea, Tr. 467. Deloach-Perea testified that IGT does not hire temporary employees to work on temporary projects, like the Stations Project, because of the logistic and administrative burden involved. Deloach-Perea, Tr. 457:7-458:9. When IGT hires an employee, even on a temporary basis, IGT must: (1) recruit; (2) interview; (3) hire; (4) on-board the new hire; (5) obtain licensing if it's a field service hire (as would have been required to work on the Stations Project); (6) complete paperwork for HR

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[6] Deloach-Perea testified:

Q. Were labor costs a consideration in deciding whether or not to use temporary employees or AppleOne temporary labor?

A. No.

Q. Why not?

A. Primarily because we are not a profit center, we're cost of goods sold, so when there are actual sales put into place, we are a sub-category on that and in any of our business profiles when the sale takes place we are secondary in those discussions, they come to us and say, we sold X amount of products, we need A, B, C and D completed and then we discuss with the customer what that looks like. But since we're a cost of goods sold, we're already -- our costs to do business from a field service standpoint is already embedded within the price to the customer.

Deloach-Perea, Tr. 467.

purposes and payroll administration; (7) and ensure supervision. Deloach-Perea, Tr. 458:10-461:7. However, when IGT uses a third party like AppleOne to provide temporary labor, AppleOne manages these issues, and provides the workforce needed for the temporary project. Deloach-Perea, Tr. 461:8-12.

When asked how IGT knew it would not be able to complete the Stations Project without using temporary labor, Deloah-Perea explained:

> At any given time in our field service organization in Southern Nevada, we have various projects that are taking place in conjunction with our day to day business. Our day to day business is at full capacity today. So we knew that adding this additional project on, in the scope of the project, we would not be able to complete the project in the timeframe on any level, even if it was within this year, if we had to use the headcount that we currently had.

Tr. 139:21-140:3. The Stations Project required IGT to complete work on over 10,000 casino gaming machines in 16 different locations, with a July 4, 2016 deadline set by IGT's client, Stations Casinos. Deloach-Perea, Tr. 166:25-167:14, 470:18-471:4. Also, Stations limited the times when IGT was allowed to work in the casinos, for example, IGT could not work on the project on the weekends. Deloach-Perea, Tr. 471:11-472:14. Even Robles conceded that the Stations Project exceeded IGT's capacity. Robles, Tr. 383:10-16.[7]

IGT also discussed with the Union using the bargaining unit to its fullest capacity, including providing it with the first overtime opportunities on the Stations Project. The Union agreed to work with the bargaining unit employees to determine whether they wanted to alter their schedules to work more on the Stations Project. Hartman. Tr. 57:14-23.[8] The Union also requested that IGT <u>hire</u> temporary employees for the Stations Project through the Union's hiring

[7] As of June 29, 2016, even with the assistance of temporary labor the Stations Project was only between 75%-80% complete and IGT was discussing a new completion date with Stations. Deloach-Perea, Tr.. 167:-18.

[8] Soto, Tr. 256:11-19 ("I believe [IGT] offered as much overtime as [the bargaining unit] wanted."). *See also* Robles, Tr. 394:17-24 (confirming that IGT said it would offer overtime to the bargaining unit and was willing to work with Union to figure out the unit's scheduling and overtime). Hartman, Tr. 454:25-455:9 (IGT asked the Union to for the bargaining unit's preference for working overtime).

hall. Hartman, Tr. 45:14-17. Deloach-Perea, Tr. 142:12-16.[9] IGT rejected the Union's offer, explaining that "[IGT] would utilize the bargaining unit to its fullest maximum potential, but we did not want to employ temporary employees." Hartman Tr. 45:18-22. *See also* Soto Tr. 254:11-13.[10] The Union did not make any other offers or proposals about the Stations Project during the March 17th meeting. Soto, Tr. 263:12-264:6.

On March 23, 2016, Hartman, as was her practice, sent Soto an email summarizing the discussions that had taken place at the meeting on March 17. Resp. Ex.2, IGT0203-04. Seven different topics that had been discussed were summarized. *Id*. Regarding the Stations Project, Hartman wrote:

> IGT is awaiting a signed contract with a specific customer for a large one-time project, but once signed, and all of the bargaining unit members are fully utilized, will follow past practice and contract with temporary labor to complete the needed work. Bargaining unit employees will be offered overtime opportunities for technician work first as much as practical. Union will provide IGT with the unit member's preference as to whether he/she would want to stay in their regular scheduled shifts, or have their schedules rearranged to accommodate the project.

Resp. Ex.2, IGT0204.

2. Requests For Information Related To The Stations Project

On March 28th, Soto responded to Hartman's email. Id. at IGT0202. Soto did not dispute Hartman's summary regarding the explanation of IGT's past practice, the offering of overtime to employees, or having the Union provide IGT with the bargaining unit's work preference regarding the Stations Project. *Id.* Rather, Soto's response mistakenly expressed concern over the circumstances in which IGT was **hiring** temporary employees. Specifically, Soto stated:

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[9] In this regard, Soto explained to IGT that the Union Hiring Hall had an A, B, and C list and that IGT could employ these individuals on a temporary basis as needed. Soto, Tr. 206:5-207:3.

[10] The nature of the hiring hall is that the individuals referred from it, on a permanent or temporary basis, become employees of the company making the request. Deloach-Perea, Tr. 143:10-16. Soto, Tr. 253:24-254:8, 254:22-256:6.

> We are concerned about the circumstances which temporary help **is hired** we would like for you to afford us the opportunity to bargain over **this change**. For the purpose of bargaining over this issue the union asks that the employer provide the following information:
>
> • A copy of any company polices or procedures with respect to the hiring of temporary help.
>
> • A list of individuals hired as temporary help giving the names and the date of hire, the rate of pay, classification, the date of termination and the number of employees hired for the temporary labor project.
>
> • Policies and procedures in respect to premium pay for temporary employees and other health benefits.[11]

Id., IGT0202 (emphasis added).[12]

Between March 28 and April 13, the following exchange between Hartman and Soto related to these requests occurred. Resp. Ex.3-4. Because these discussions were part of lengthy emails containing other information requests, the relevant portions are excerpted below.

> 1. Soto request: A copy of any company polices or procedures with respect to the hiring of temporary help.
>
> Hartman Response: This information has already been provided to the Union.
>
> Soto Follow-Up: I have reviewed the information received and in your GTECH Employee Guidebook I don't see a temporary help sub section or any language in regards to a third party contractor. Can you please provide relevant information on Both IGT And GTECH policies
>
> Hartman Response: The legacy IGT temporary agency employees policy has been provided to the Union. Legacy GTECH does not have an equivalent policy.
>
> 2. Soto Request: A list of individuals hired as temporary help giving the names and the date of hire, the rate of pay, classification, the date of termination and the number of employees hired for the temporary labor project.
>
> Hartman Response: In the short time since the unit elected union representation, projects requiring temporary help have not occurred, other than the upcoming project already discussed with the Union. In the past, generally, in Las Vegas, the Company has used

[11] These requests for information are not at issue in the Complaint.

[12] As stated above, these requested were fundamentally erroneous as IGT did not **hire** temporary employees, which it had already informed the Union. Resp. Ex. 17, Mar. 31, 2011 IGT/AppleOne Contract.

outside contractors/ contracting vendors to staff projects, not temporary employees. We anticipate the same process during the upcoming project once all unit members have been utilized to their maximum capacity.

Soto Follow-Up: Since a third party contractor has never been used I believe the information is relevant in order to bargain effectively. I have reviewed the information received, and in your GTECH Employee Guidebook I don't see a "temporary help" sub-section or any language in regards to a "third party vendor". Can you please provide relevant information on Both IGT and GTECH policies?

Hartman Response: As noted above, the Company has previously utilized outside contractors/contracting vendors within the Field Services organization. In addition, the legacy IGT temporary agency employees' policy has been provided to the Union. Legacy GTECH does not have an equivalent policy. Please clarify your request as it seems to be improperly premised.

3. Soto Request: Policies and procedures in respect to premium pay for temporary employees and other health benefits.

Hartman Response: Agency personnel do not receive premium pay or health benefits through IGT.

Soto Follow-Up: Since a third party contractor has never been used I believe the information is relevant in order to bargain effectively.

Hartman Response: As noted above, the Company has previously utilized outside contractors/contracting vendors. In addition, the legacy IGT temporary agency employees' policy has been provided to the Union Legacy GTECH does not have an equivalent policy. Please clarify your request as it seems to be improperly premised.

Soto never responded to Hartman's April 13, 2016 requests for clarification.

3. April 22, 2016 Email Chain Regarding The Stations Project

The Stations Project started on April 18, 2016.[13] Robles, Tr. 397. The next communications between the parties about the Stations Project occurred in several emails dated between April 20 and April 22, 2016. This email chain in its entirety is identified as Respondent's Exhibit 7.

This exchange began on April 20, 2016 when Soto emailed Hartman regarding some

[13] Consistent with their agreement, IGT had emailed all bargaining unit employees on April 15 to determine who was interested in working overtime on the project. GC 26; Deleoach-Perea, Tr. 162.

concerns over the Stations Project, including: (1) the AppleOne Material Handlers were wearing IGT t-shirts; (2) the AppleOne Material Handlers wanted to learn too much from the IGT Technicians (bargaining unit members); and (3) the potential for the AppleOne temporary labor group "taking trained IGT technicians jobs." Resp. Ex. 7, IGT0218-219.

On April 21st, Hartman explained: (1) IGT's past practice was to use contractors for temporary labor (Tr. 75:16-21) and it wanted to continue to do so; (2) IGT was honoring the commitment made to the Union to offer the bargaining unit technicians overtime on the Stations project; (3) the bargaining unit technicians are being used to their full capacity by IGT; (4) IGT was not willing to hire any employees for the Stations Project; and (5) Stations required the AppleOne temporary laborers to wear IGT shirts to identify who is working on the Project. Resp. Ex. 7, IGT0218.

Soto responded that same day and did not dispute or challenge the fact that: (1) the bargaining unit was being fully utilized; (2) IGT was honoring its commitment to offer the bargaining unit first overtime; or that (3) Stations required the temporary laborers to wear IGT shirts. Instead, he asserted that IGT never told the Union that the temporary laborers would wear IGT shirts or be assigned some of the same work that the bargaining unit was capable of performing, and concluded: "This work is normally done by the bargaining unit and would like the opportunity to bargain over this unilateral change." *Id.*, IGT0218.

In her April 21st response, Hartman once again corrected Soto's characterizations, again explaining that in the past IGT had used temporary labor to do work that technicians are capable of doing to supplement IGT's work needs on discrete projects and IGT would continue to do so. *Id.*, IGT0217. Hartman further explained that the Stations Project would have no impact on the bargaining unit because "[IGT has] agreed to make sure that every member of the bargaining unit is fully utilized first, including whatever overtime that individual wants to work, giving the

bargaining unit preference and maximum opportunity during the project." *Id.*, IGT0218. Finally, Hartman reemphasized that IGT would not hire temporary employees for the Stations Project, and invited the Union to make any other proposals to which IGT would respond. *Id.*

In his April 22nd response, Soto wholly ignored Hartman's detailed explanation, and again incorrectly asserted that "what's currently happening is a change in [the bargaining unit's] working conditions and would like to be afforded the opportunity to bargain over this change." *Id.* IGT0217. Additionally, Soto claimed that "bargaining unit members are being left out of the overtime list and are having to request to be put on the overtime list." *Id.*

Hartman responded that same day and committed to immediately looking into whether anyone had inadvertently been excluded from overtime and asked Soto to provide her with the names of any bargaining unit members who he believed were left off the overtime list. *Id.* Hartman further wrote:

> [The Union seems] to have ignored the information we have provided you with, and the discussions we have already had. Continuing to go around in circles is not productive. We are not willing to hire more employees. **If there is any other proposal about this topic you want us to consider, please let me know**.
>
> *Id.*

Soto did not respond to Hartman's April 22, 2016 email. Hartman confirmed no one had been excluded from overtime. Soto similarly testified that he did not provide IGT with the requested list of names and that the Union never identified anyone who had been left off the overtime list. Soto, Tr. 321:19-20, 329:3-7.

4. May 4, 2016 Bargaining Meeting

IGT and the Union met again on May 3 and 4, 2016. As was the practice, a portion of the May 4 meeting was set aside to discuss interim issues with Soto. Robles, Tr. 401-02. IGT raised the topic of the ongoing Stations Project to update the Union on the status of the project and to

confirm that everyone was being fully maximized and offered overtime. As Robles testified, the parties discussed IGT's desire to "make sure that every single person that wants to work on [the Stations Project] gets the most opportunity to work the most time." Robles, Tr. 402:11-403:3. This included discussing providing overtime for the bargaining unit members. *Id.*

The parties also discussed the reason why the temporary laborers had to wear old IGT shirts (the client's demand)[14]; the temporary workers being supplied tools (purchased by the client, not IGT)[15]; the union's request to use two bargaining unit members as a lead and assistant lead on the project (IGT agreed to the Union's proposal); and the Union's request to provide the special events bargaining unit members' schedules more than 24 hours in advance[16]. Hartman, Tr. 81:15-84:24; Deloach-Perea, Tr. 475:10-21.

5. On May 4, 2016, IGT Did Not Threaten Employees With A Loss Of Any Benefits And Did Not Directly Deal With Any Employees To The Exclusion Of The Union.

Relevant to the proposed amended allegations, the testimony presented by the General Counsel about the exact conversation on May 4, 2016 varied between witnesses, and changed under questioning. Below is a summary of Soto's version of the relevant exchange.

Q. Who brought up the subject of temporary workers on May 4th?

A. Theo Gould.

Q. Okay. Do you recall what he said?

---

[14] IGT again explained that Stations requested that all people working on the Stations Project wear an IGT shirt for security reasons. Deloach-Perea, Tr. 477:2-25. Thereafter, IGT offered to have the AppleOne employees wear an old IGT t-shirt and to provide new ones to the bargaining unit to wear. The Union agreed to this. *Id.*

[15] IGT did not provide tools to the temporary material handlers supplied by AppleOne. Deloach-Perea, Tr. 462:11-13. Stations Casinos, IGT's client, purchased the tools through IGT to be used by the AppleOne material handlers on the Stations Project. Deloach-Perea, Tr. 462:14-18. As Deloach-Perea testified, "those tools actually belong to Stations property." *Id. See also* Deloach-Perea, Tr. 481:13-482:6.

[16] IGT explained that it was trying to schedule better but "business circumstances required the scheduling as it was." Soto, Tr. Tr. 373:12-21. As a result of this discussion, however IGT is now providing 1-weeks' notice and working towards 2-weeks. *Deloach-Perea, Tr. 475:10-21.*

A. Theo Gould began the conversation, you know, a typical conversation. He wanted to explain the project, the UGA project and that they weren't interested in hiring anymore people. I replied that I never asked you to hire more people; he said that we've used all the guys and they're -- guys are signing up for overtime. I told him again I'm not -- thank you for the overtime, but we never bargained over AppleOne doing bargaining unit work. …

Q. Okay. Was -- was there any further discussion of what was going to be -- of whether or not temporary workers would continue to be used?

A. The discussion got pretty heated at that time, Theo kept mentioning other than hiring more people, other than doing -- other than doing what you're asking us to do how do you expect us to get the work done. I said, until I get the information request and you give me the opportunity to bargain over AppleOne I can't make any formal requests. He asked if I could please stop using all the legal buzz terms because we were just having a discussion and that if we could just talk. And I said, well, I can't talk because under the Act I'm supposed to be afforded information I'm requesting. He then said, I don't care what you say or what you feel the Act says. I replied, then if you don't care what I have to say this meeting is over.

Soto, Tr. 221-22[17]

Q. Okay. And so then -- and when you say it was heated you're referring to me [Gould], right?

A. Yes.

Q. And you're referring to yourself [Soto], right?

A. Yes.

Soto, Tr. 332

Q. And it was at that point that I [Gould] addressed that the Mr. Robles and Mr. West, right?

A. Yeah, and you said that I would take money from their pockets because I was[n't] [sic] going to bargain over overtime.

Soto, Tr. 333

[17] As explained earlier, Soto's claim that he could not make a proposal about the Stations Project because he had outstanding information request that had not been responded to by IGT is false. As of May 4th, the Union did not have any outstanding requests for information about the Stations Project. The details of the information that was requested and responded to by IGT is set forth in detail *supra*. Moreover, the Union has never filed any Charge alleging a failure to provide information regarding the Stations Project.

However, Soto admits that his memory of exactly what was said is not accurate.

> A. After you said that you weren't interested in hiring more people I mean it was a discussion. We were -- it's hard to explain the conversation because a lot of people -- there was a lot of back and forth. I was talking, you were talking. Cindy was trying to say some things. You know it was a heated conversation.

Soto, Tr. 330 -31.

The details of this exchange further varied according to the GC's other witnesses. West testified, "I remember Theo asking if we were going to let Jose take money out of our pockets by using the temp workers, or something of that sort. I don't remember exactly the words that were being used; I just remember things getting a little louder than normal." West, Tr. 425:3-11. Robles testified that Gould's words were not directed at him at all, but at Soto, and that Gould told Soto "stuff like" "I can't believe you're doing this to your guys, you're affecting their pay, don't do this to your guys." Robles, Tr. 390:15-25. Robles further explained when questioned by Gould at the hearing:

> Q. And but he [Soto] was using the word bargain a lot, right?
>
> A. Correct.
>
> Q. And I [Gould] kept on trying to focus it on to talk about the overtime and offering overtime, right?
>
> A. Yeah.
>
> Q. All right. At the end of the -- that exchange, we took a break, right?
>
> A. Correct.
>
> Q. And nobody went anywhere?
>
> A. Correct.
>
> Q. We stayed put?
>
> A. Yes.

Q. And we -- after a short break, we came back to the table, right?

A. Yes.

Q. And we continued to talk?

A. Yes.

Q. Was any overtime taken away from anybody?

A. No.

Robles, Tr. 405-06.

Soto testified that he was the one who asked for a caucus, "because it was getting heated and I figured just keep things professional." Soto, Tr. 333:15-22. After the caucus, the parties returned together and discussed Soto's suggestion that IGT use two bargaining unit members as leads on the Stations Project. Soto, Tr. 334:2-335:16. IGT agreed to the Union's proposal.

The May 4 meeting concluded with IGT saying that if there was anything else the Union wanted to suggest regarding the bargaining unit to let IGT know. Soto, Tr. 334:17-21. Soto testified that at the end of the meeting he said he would speak with the bargaining unit and afterwards "I'll send [IGT] a letter of understanding that way we can commence bargaining over AppleOne doing the work." Soto, Tr. 222:22-24, Soto, Tr. 336:23-337:2.

On May 10, 2016, consistent with her practice, Hartman sent Soto an email summarizing the May 4, 2016 meeting, which in pertinent part stated:

> **Temporary Labor Project**
>
> As has previously been discussed, IGT has agreed to providing the most opportunity to maximize the unit members for the project and has asked employees if they would like to work overtime. The Union recommended placing a lead and assistant lead on the project. Two unit members had already been assigned for this and have been working in this capacity since the project kicked off. The Union will meet with the bargaining unit and propose in writing additional recommendations.

Resp. Ex. 8, IGT0200 (GCX 10). Hartman, Tr. 84:25-85:9.[18]

The Union did not file any unfair labor practice charges regarding the May 4, 2016 exchange.

6. The Union's Letter Of Intent And Related Email Exchanges

On May 12, 2016, Soto emailed Hartman stating, "We would also like AppleOne to stop doing bargaining unit work and afford us the opportunity to bargain over this unilateral change." Resp. Ex. 11, IGT0187. On May 17, 2016, Hartman responded, explaining:

> We have repeatedly told you that there is no unilateral change and AppleOne is not doing the work of anyone in the bargaining unit. To the contrary, IGT has repeatedly agreed to provide the unit members first opportunity to work extra hours on this one time project. Only after the bargaining unit is fully maximized is the Company utilizing an outside contracting vendor, as is the past practice. Furthermore, there has been no failure to bargain. The Union requested that we hire more employees. We rejected that proposal at our meeting in March. Regarding the details of the project, we have already incorporated your suggestions. We have offered overtime to all the unit employees first, and agreed to continue trying to find ways to give them as much notice as possible within the restrictions of the FSTs regular job calls and hours. You asked for a lead and assistant lead on the project. Two unit members have been assigned for this project. The Union advised they would meet with the bargaining unit and propose in writing additional recommendations which we have not yet received.

Id.

Eventually, on May 19, 2016, Soto emailed Hartman the Union's proposed Letter of Understanding ("LOU") wherein the Union asked IGT to agree to the following:

> Work of the type customarily performed by employees in the bargaining unit covered by this Letter of Understanding may be contracted out only if the Union cannot furnish the Employer qualified employees to perform the work.

Resp. Ex. 12, IGT0102. Soto testified that through the LOU the Union was proposing that IGT temporarily hire the "qualified employees" furnished by the Union. Soto, Tr. 342:24-344:8.

[18] On May 11, 2016, Soto responded stating: (1) he did not believe an agreement was reached on the Stations Project; (2) his belief that AppleOne laborers were working on the Stations Project without giving the Union the chance to bargain; and (3) he was preparing the letter of understanding for IGT's consideration. Resp. Ex. 9, IGT0197.

However, Soto admitted that he was aware that since March 17, 2016, IGT had consistently told the Union that it would not hire temporary employees to work on the Stations Projects, and instead it was and has been IGT's practice to contract for temporary laborers from a third party like AppleOne to provide the temporary labor needed in such circumstances. Resp. Exs. 2, 7, 8, 11. The LOU contained no proposals regarding the existing bargaining unit, and requested nothing from the Company regarding the Stations Project other than hiring temporary employees.

IGT rejected the LOU because the single proposal contained therein – for IGT to hire employees – had been already been rejected 2-months earlier on March 17 when IGT explained to the Union that for reasons other than labor cost, it did not want to hire temporary employees on the Stations Project. IGT had repeated this position to the Union in writing numerous times, many of which are detailed above. Nevertheless, despite the questionable motivation of the Union's actions in proposing an LOU they knew IGT would reject, once again, Hartman emailed Soto on May 23, 2016 and offered, "If you would like to discuss a proposal regarding the terms and conditions of the bargaining unit, we stand ready to negotiate in good faith." Resp. Ex. 14. As of the date of the hearing, the Union had not responded to Hartman's May 23 email or her offer. Further, there are no information requests outstanding relating to the Stations Project. While Soto testified about a number of proposals the Union could have made to IGT related to the Stations Project, he also conceded that the Union voluntarily decided not to make those proposals to IGT. Soto, Tr. 358:13-359:8.

7. The Use Of AppleOne For Temporary Labor On The Stations Project Did Not Have Any Impact On The Bargaining Unit.

As stated above, the record evidence established that the use of temporary labor on the Stations Project did not have any impact on the bargaining unit members. No bargaining unit

members were laid off or lost hours when the AppleOne Material Handlers were used. Deloach-Perea, Tr. 167:19-24.[19] Deloach-Perea testified that the bargaining unit was full to its capacity with work, and the Stations Project exceeded the capacity of the work that bargaining unit members could physically perform. Tr. 139:21-140:3. She further explained that "we have overtime that's available every day, seven days a week, at any time that [bargaining unit members] want it regardless of a project scope. We always have overtime available." Tr. 164:13-18.

In this regard, the GC asked Deloach-Perea, "do you have personal knowledge that every technician who requested to work overtime was permitted to work the overtime they requested?" Tr. 172:14-17. Deloach-Perea answered in pertinent part, "I would say yes, they're all able to work overtime every single day, seven days a week." Tr. 172:18-19. *See also* Deloach-Perea, Tr. 174:4-6 ("Overtime is always offered. We always have work to do in Las Vegas. Always. Every day."). Moreover, Robles testified that he would have earned the same regardless of if he was working full time on the Stations Project, and that working full time on other IGT work did not affect how much he earned. Robles, Tr. 409:6-12.

D. The Union's Requests For Information And IGT's Responses

Through the course of collective bargaining and dealing with day-to-day issues, the Union has issued dozens of information requests. *See ie*. Resp. 4. Only two are at issue in this case and are summarized below.

1. Request For Information For All Of IGT's Locations

With respect to IGT locations, the Union asked for "A list of all company locations."

[19] There was incomplete and irrelevant testimony about a couple of "fly away" team members who were laid off 4-months before the Stations Project when the" fly away" team was relocated from Las Vegas to Rhode Island. In addition to the fact that those team members performed a different job than the Bargaining Unit, those team members were either reassigned into a different position at the Company, or voluntarily agreed to sever their connection to the Company. The Stations Project, which started approximately 4-months later, was unconnected to that decision making, and there was no one on lay off at the time the Stations Project commenced.

Resp. Ex. 3, at IGT0173. Originally, Soto testified that the Union is aware that IGT is an international Company, and a request for all locations was not limited and meant what it said, **all locations** where IGT conducted business everywhere in the world, even though there was no connection to this bargaining unit. Soto, Tr. 241:8-13. In response to the request, Hartman explained that, "Responsive information applicable to the bargaining unit members has already been provided to the Union." *Id.*[20] On April 7th, Soto asked Hartman to,

> [P]rovide a list of all jurisdictions where IGT and GTECH conducts business for example Prescott AZ, Scottsdale AZ, Coachella CA, Needles CA, Pauma Valley CA, Cabazon CA, Pala CA and Temecula CA etc. Including premium pay and health benefits.

Id. (emphasis added).

Hartman responded on April 13, 2016 by asking Soto to "[p]lease provide the justification for providing all Company locations." Resp. Ex. 4, at IGT0133. To date, the Union has not responded to Hartman's question.

Ultimately, during the hearing, Soto conceded that the Union did not want all locations as requested, but actually only wanted a list showing IGT's New York locations and the locations within the region where the Union represents other bargaining units. Soto, Tr. 242:1-8. Soto admitted that he had never previously followed up or explained this limitation to IGT. Soto, Tr. 243:10-16.

2. Request For Information For Wage Scales Of All IGT Technicians

On April 7, 2016, Soto emailed Hartman to clarify the Union's requests for information and asked in pertinent part for IGT to:

> [P]rovide the wage scale for the techs in jurisdictions where IGT and GTECH conducts business for example Prescott AZ, Scottsdale AZ, Coachella CA,

[20] Hartman testified that this information was mailed to the Soto. Hartman, Tr. 453:4-454:11. Soto testified that if Hartman says she sent then he assumes she did in fact send it. Soto, Tr. 371:10-25.

> Needles CA, Pauma Valley CA, Cabazon CA, Pala CA and Temecula CA etc. Including premium pay and health benefits.

See Resp. Ex. 3, IGT0172-74.

On April 13, 2016, Hartman explained, "All plans are all the same and have been provided to the Union." Resp. Ex. 4, at IGT0132. Hartman was referring to the fact that IGT's wage scale is applied the same across the country and that IGT provided the wage scale information to the Union in September 2015 as part of an earlier information request. On May 17, 2016, at Soto's request, Hartman provided the following clarification:

> All plans are the same; however, we do apply a geographical differential based on national average market data in areas throughout the country where there is a higher or lower cost of living. Geographical differentials are determined based upon where an employee works. A geographical differential does not apply to Murrieta, CA or Las Vegas. In Phoenix, AZ area there is a -7% geographical differential.

Id. *See also* Hartman, Tr. 105:16-106:23

On May 18, 2016, Soto followed up and specifically limited the Union's request for wage scale information to Hartman by asking her to "send me a copy of the plans used to apply geographical differentials." Resp. Ex. 11, at IGT0185. Soto, Tr. 349:25-350:9. Hartman replied on May 23rd, explaining:

> We use a software program called ERI Economic Research Institute, that we purchase, and the data is updated quarterly from them. The way their program works is that we enter the employee's zip code and the systems tells us if there is a differential or not. We have already provided you the area differential information you requested.

Resp. Ex. 13, at IGT0179.

The Union did not request any additional information regarding wage scales from IGT. At the hearing, for the first time, Soto stated that even though the request was for IGT's wage scales everywhere, the Union only wanted those wage scales in its region and that Hartman provided him the geographical differential that would be applied to the relevant region. Soto, Tr.

348:23-350. Further, at the hearing, when specifically asked what other information the Union believed IGT needed to produce, Soto testified, "I would want to know how the program works. I want to know where the software came from. I would want to know a lot of things." Soto, Tr. 352:22-353:6. However, Soto admitted that he never requested that information from IGT. Id.

E. IGT's Separation Agreement

Under certain circumstances, IGT may offer a separation agreement to a former employee for that person to consider. Doti Tr. 192:12-22. As Doti explained,

> Q. Is this separation agreement [GC 27], is this part of the informing the employee that they will no longer be with the company?
>
> A. No. We inform the employee that they will no longer be with the company and then after they've been informed of that we, in some cases, offer the separation agreement.

Doti, Tr. 192-93[21]

Doti further testified that GC 27 was an old version of the Separation Agreement, no longer used by the Company. Doti Tr. 189:22-190:1 (emphasis added). The GC never established how long the older version had been used, other than it was no longer relevant.[22] IGT's In-House Counsel, Bethany Hunt, testified that as of January 25, 2016, IGT ceased using GC 27. Specifically, IGT changed the non-disparagement language found in GC Exhibit 27 to that found in Resp. 20, which provides:

> You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT. **Nothing in this clause is intended to prevent you from testifying in a legal proceeding or**

[21] Q. Do you have knowledge of when this agreement is provided to workers, I'll call them?

A. It's not provided to workers. It's provided to former employees

Doti, Tr. 190.

[22] General Counsel asked, "Can you tell me whether or not this agreement was in effect as of May 31st of this year?" to which Doti responded, "I am not aware which version was in effect at that time." Doti Tr. 190:8-10.

> **complying with a subpoena, and nothing is intended to interfere with any of your rights to consult with anyone on employment matters, whether or not those matters lead to court or legal proceedings.**

Resp. Ex. 20, Section 8. *See also* Hunt, Tr. 487:4-17-488:23.

There is no record evidence regarding whether the Separation Agreement was ever shown to or seen by any employee of IGT.

III. ARGUMENT

General Counsel has the burden to prove by a preponderance of the evidence the facts sufficient to show alleged violations of Sections 8(a)(1) and (5) of the Act. *Pan American Grain Co., Inc.*, 351 NLRB 1412, n. 9 (2007); *Vista Del Sol Health Servs., Inc.*, 363 NLRB No. 135 (Feb. 24, 2016). In this case, the GC has not carried his burden and the claims must be dismissed.

A. General Counsel Did Not Establish That IGT Failed To Respond To The Union's Information Requests.

General Counsel claims that IGT violated the Act by failing and refusing to respond to two requests for information from the Union. Compl. ¶¶ 6(g)-(i) & 8. Specifically, the GC alleged that on April 7, 2016 the Union asked IGT to provide it with:

> (1) [] the wage scale for the techs in jurisdictions where IGT and GTECH conducts business for example Prescott AZ, Scottsdale AZ, Coachella CA, Needles CA, Pauma Valley CA, Cabazon CA, Pala CA and Temecula CA etc. Including premium pay and health benefits.
>
> (2) A list of all company locations.

Id. at ¶ 6(g). The GC further alleged that since April 13, 2016, IGT, through Hartman failed and refused in writing to supply the requested information. *Id*. at ¶ 6(i). Neither the facts nor the law supports the GC's allegations.

1. Legal Standard

"The employer has an obligation to supply, upon reasonable request, to the bargaining

representative of its employees relevant information to assist the union's effective performance of its duties under a collective bargaining agreement." *NLRB v. Wachter Contr., Inc.*, 23 F.3d 1378, 1384 (8th Cir. 1994) (citing *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-36 (1967)) (emphasis added).[23]

Generally, requests for information related to the bargaining unit or bargaining issues such as wages, hours or other terms and conditions of employment are considered presumptively relevant and must be provided. *See generally Coupled Products*, 359 NLRB No. 152 (2013). However, Information pertaining to non-bargaining members is not presumptively relevant. *See San Diego Newspaper Guild, Local No. 95 of Newspaper Guild*, 548 F.2d 863, at 867-68 (9th Cir. 1977). The requesting party has the burden of establishing the relevance of that requested material. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Earthgrains Co.,* 349 NLRB No. 34 (2007); GC Memo 11-13.

If, instead of responding to a request for information that is not presumptively relevant, the employer asks the union to explain how the information is relevant, then the employer is not obligated to produce the information until the union has shown the information is in fact relevant. *See Superior Protection Inc.*, 341 NLRB 267, 269 (2004) (citing *Streicher Mobile Fueling, Inc.*, 340 NLRB No. 116, slip op. at 2 (2003); *Cheboygan Health Care Center*, 338 NLRB 802, 803 fn. 2 (2003); *Union-Tribune Publishing Co.*, 220 NLRB 1226 (1975) (finding that employer did not violate the act by not responding to a request for information that was not presumptively relevant when the union could not demonstrate that the information was relevant) (*enforced*, *San Diego Newspaper Guild* (9th Cir), *supra*).

[23] *See also Soule Glass and Glazing Co., et al v. NLRB*, 652 F.2d 1055, 1092 (1st Cir. 1981), and *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 866 (9th Cir. 1977).

2. IGT Responded To The Union's Request For Wage Scale Information

The Union's first request for wage scale information came on April 7, 2016, to which IGT responded on April 13th "All [wage scale] plans are the same and have already been provided to the Union." Resp. Ex. 4, IGT0132. Notwithstanding that the request for information was presumptively not relevant as it was overbroad covering all technicians who work for IGT in the entire world, IGT did not completely refuse to provide all the requested information to the Union on April 13th as alleged in the Complaint. Rather the Company clarified that the information regarding the bargaining unit had already been provided. Thereafter, on May 17th, IGT provided the Union with wage rates in response to a different request that is not at issue, and then further explained that with respect to wage scales:

> All plans are the same; however, we do apply a geographical differential based on national average market data in areas throughout the country where there is a higher or lower cost of living. Geographical differentials are determined based upon where an employee works. A geographical differential does not apply to Murrieta, CA or Las Vegas. In Phoenix, AZ area there is a -7% geographical differential.

Resp. Ex. 10, IGT0191 & Resp. Ex.13, IGT0180. Soto responded to this information on May 18, 2016. Resp. Ex. 11, IGT0185. He did not ask for clarification or claim he needed additional information to understand Hartman's May 17th response. *Id.* Instead, Soto, apparently satisfied with Hartman's response, changed the Union's request from a request for wage scale information to a request to "send me a copy of the plans used to apply geographical differentials." Resp. Ex. 11, at IGT0185. Soto, Tr. 349:25-350:9. On May 23rd Hartman provided the requested information, explaining:

> We use a software program called ERI Economic Research Institute, that we purchase, and the data is updated quarterly from them. The way their program works is that we enter the employee's zip code and the systems tells us if there is a differential or not. We have already provided you the area differential information you requested.

Resp. Ex. 13, at IGT0179. Soto received Hartman's response and did not ask for a further response about wage scale information or for additional information about the geographical differential.[24] *Id.* *See First Transit, Inc*., 2014 NLRB LEXIS 768 (ALJ Wedekind 2014) (dismissing allegation where Union acknowledged that the Company had responded to the Union's request for information).

Thus, since the evidence shows IGT provided appropriate information in response to the Union's presumptively irrelevant request for the wage scales of all IGT locations, and the Union expressed no objection to the information IGT ultimately provided, this claim must be dismissed.

3. IGT Responded To The Union's Request For All IGT Company Locations

Similarly, the claim that IGT failed and refused to respond to the Union's request for a list of all Company locations must be dismissed because IGT appropriately responded to the presumptively irrelevant request. The Union asked IGT for a list of all Company locations. Resp. Ex. 3, at IGT0173. The Union's request was not presumptively relevant because it sought information outside of the bargaining unit and unrelated to the Union's duties to the bargaining unit. *San Diego Newspaper Guild, Local No. 95 of Newspaper Guild*, 548 F.2d 863, at 867-68 (9th Cir. 1977). Acting in good faith the presumptively irrelevant request. IGT properly responded by providing the Union with a list the locations where the bargaining unit employees performed work.

On April 7, 2016, the Union again stated that it wanted IGT to provide "A list of all company locations." *Id.* IGT shifted the burden back to the Union by asking Soto to "Please provide the justification for providing [the Union with] all Company locations." Resp. Ex. 4, IGT0133. *See e.g. Union-Tribune Publishing Co.*, 220 NLRB 1226 (1975) (finding that

[24] Although Soto testified that he may have wanted more information from IGT, he also testified that he never followed up to request the additional information he may have desired. Soto, Tr. 352:22-353:6.

employer did not violate the act by not responding to a request for information that was not presumptively relevant when the union could not demonstrate that the information was relevant) (*enforced*, *San Diego Newspaper Guild* (9th Cir), *supra*). The Union never responded to IGT's request.

Therefore, as IGT satisfied its duty to respond to the requests for information, and stayed any obligation it may have had to provide the list of all IGT locations until the Union provided a response explaining the relevance of the information, the claim must be dismissed.

B. General Counsel Failed To Establish That IGT Violated The Act With Respect To Its Use Of AppleOne For Temporary Labor On The Stations Project.

Related to IGT's use of AppleOne for temporary labor, General Counsel alleges that IGT violated Sections 8(a)(1) and (5) of the Act as follows:

> (d) At various times from about September 2015, through May 2016, Respondent and the Union met for the purposes of negotiating an initial collective-bargaining agreement with respect to wages, hours, and other terms and conditions of employment for the Unit.
>
> (k) Since about April 2016, Respondent began using subcontractors to perform the same work as employees in the Unit at various worksites.
>
> (l) The subjects set forth above in paragraph[] … 6(k) relate[s] to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.
>
> (m) Respondent engaged in the conduct described above in paragraphs 6[k] through 6(l) without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct and without first bargaining with the Union to an overall good-faith impasse for a collective-bargaining agreement.

Compl. ¶¶ 6(d), (k)-(m), & 8.

As set forth below, the GC's allegations fail.

1. IGT's Use Of AppleOne On The Stations Project Maintained The Status Quo, As Demanded By The Union

By its June 15, 2016 letter, the Union requested that IGT maintain the status quo and not

make any changes to the way the Company operates until after a first contract had been finalized. The GC Counsel has failed to introduce any evidence showing that IGT began using AppleOne in April 2016, or that IGT's use of AppleOne for temporary labor on the Stations Project was a unilateral change or deviation from the status quo demanded by the Union. To the contrary, the evidence established that IGT has used AppleOne to provide temporary labor on temporary projects since before the bargaining unit was certified in May of 2015. Respondent's Exhibit 17 is a copy of IGT's contract with AppleOne effective March 31, 2011, with amendments made in 2013 (IGT0083-84), 2014 (IGT0086), and 2015 (IGT0091).[25]

Moreover, Deloach-Perea testified without contradiction that IGT does not hire employees for temporary projects and has used AppleOne Material Handlers on temporary projects for the eight years she has worked for IGT. Deloach-Perea, Tr. 166:3-22, 173:4-10, 457:7-458:9, 467:17-468:4, 469:7-470:17, 478:16-479:12. She also provided specific examples of IGT's past practice of using AppleOne for temporary labor on temporary projects including a Stations Casino project in 2014 and the annual gaming convention project in Las Vegas. *Id.* Hartman also testified about IGT using AppleOne in 2015 on a temporary project in IGT's depot area. Hartman, Tr. 77:1-5.

Accordingly, by following past practice and maintaining the status quo on the Stations Project, IGT complied with the Union's June 15 letter and has not violated the Act. *See WCCO-TV*, 362 NLRB No. 101 (2015); *Chromalloy Am. Corp*., 286 NLRB 868 (1987) (actions consistent with past practice of and criteria for subcontracting lawful during pending negotiations).

[25] The 2015 amendment was made before the certification of the bargaining unit. It was signed on December 4, 2014 and was effective January 1, 2015. Resp. Ex. 17, IGT0091.

2. IGT's Use Of AppleOne On The Stations Project Did Not Have Any Demonstrable Impact On The Bargaining Unit Employees

Notwithstanding the past practice, because labor cost was not a consideration, IGT does not have an obligation to bargain over a decision that had no impact on the bargaining unit, such as the use of AppleOne Material Handlers on the Stations Project. To prove an 8(a)(5) failure to bargain violation, General Counsel must either prove that labor costs were a consideration in the decision or that "the employer made a material and substantial change in a term of employment without negotiating with the union." *Pan American Grain Co, Inc.*, n. 9, *supra* (citation omitted) *see also J & J Snack Foods*, 363 NLRB No. 21 (2015) (even if the Board would consider the Company's decision to act consistently with past practice a "unilateral change", the Board has continued to adhere to the proposition that "the duty to bargain arises only if the changes are 'material, substantial and significant.'"). It is the burden of the GC to establish either prong. *North Star Steel Co*., 347 NLRB 1364 (2006).

Regarding labor cost, Deloach-Perea's detailed testimony that labor cost was not a consideration in IGT's decision making is undisputed. Although the facts in the present case are unique, the Board's decision in *Mercy Health Partners*, 358 NLRB 566 (2012) is instructive. In *Mercy Health*, which was decided in the context of assigning work outside of the existing bargaining unit, the Board confirmed that where labor cost is not a consideration, and there is no impact on the bargaining unit, as is the case here, the Company does not have to bargain with the Union over its staffing decision.[26]

Similarly, in *Professional Medical Transport, Inc. Local No.* 1., the Board recently reconfirmed that bargaining is not required when labor cost is not a consideration in whether or

[26] Please note that the typical "subcontracting" cases do not apply to this situation. This case deals with a one-time, large project after the bargaining unit was fully utilized and beyond the unit's capacity, not a decision to subcontract out unit work or otherwise reassign work. Furthermore, the unit employees were offered the ability to perform this work first. The Company only followed past practice and utilized a vendor for temporary labor after the unit was fully maximized, and by definition could not perform this work.

not to assign work outside of the bargaining unit:

> The General Counsel contends that the decision to relocate station 2 employees was a mandatory subject of bargaining because it did not involve a change in the scope and direction of the enterprise, citing Dubuque Packing, 303 NLRB 386 (1991), enfd. sub nom. Food & Commercial Workers Local 150-A v. NLRB, 1 F.3d 24 (D.C.Cir. 1993). However, as indicated by the Company, under Dubuque even relocations that are unaccompanied by a fundamental change in the business do not require bargaining "[i]f the employer shows that labor costs were irrelevant to the decision." Id. at 391. Here, there is no dispute that the relocation had nothing to do with labor costs. The purpose of the relocation was simply to provide the crews with better working conditions, as station 3 is a newer facility with working air conditioning and toilets, a large kitchen and breakrooms, and a secure parking lot, and there is no evidence that any unit employee suffered a reduction in pay or benefits. (Tr. 151–152, 701.) Accordingly, the Company clearly had no duty to bargain over the decision.

2015 NLRB LEXIS 132 (2015) (emphasis added).

Moreover, the decision to supplement the bargaining unit on the Stations Project with AppleOne Material Handlers had no impact on the bargaining unit. "The board has long held that an employer is not obligated to bargain over changes so minimal that they lack such [a material, substantial, and significant] impact [on the bargaining unit]." *The Toledo Blade Company, Inc*., 343 NLRB 385, 388 (2004) (citation omitted); s*ee also Coca Cola Bottling Works, Inc.*, 186 NLRB 1050, 1062 (1970) (no duty to bargain where company's choice to unilaterally discontinue the use of a certain bottling machine "did not result in any loss of employment for any employees; merely a change in duties" because the duty to bargain is not triggered unless the company's change has a demonstrable adverse effect on the bargaining unit employees).

In *General Electric*, 264 NLRB No. 56 (1982), a case where the issue was whether the company violated the act by failing to bargain over permanently subcontracting out a portion of work previously done by a member of the bargaining unit – more extreme than the issues presented in this case - the company argued it did not violate the act because there was little or

no adverse impact on the bargaining unit. In finding the company did not violate the Act, the judge stated:

> Considering all of the factors described above, but noting specifically and relying primarily on the fact that the amount of work subcontracted by Respondent to Kanawha Janitorial Service which previously had been performed by Reed was so slight as to be de minimis and have no demonstrable adverse impact on unit employees, I find that Respondent has not violated Section 8(a)(5) and (1) of the Act as alleged in the complaint, and I will therefore recommend that the complaint be dismissed in its entirety.

Id.

Likewise, in *Professional Medical Transport, Inc. Local No.* 1., *supra*, the Board reached a similar conclusion after initially finding that labor cost was not a consideration in the company's decision to assign work outside of the bargaining unit:

> The General Counsel also contends that the Company had a duty to bargain over the effects of the relocation. And it is generally true that, "[e]ven when an employer does not have a duty to bargain about a decision to relocate, it still has a duty to bargain with the union over the effects of that decision on unit employees." Mercy Health Partners, 358 NLRB No. 69, slip op. at 2; citing First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681 (1981). See also Naperville Jeep/Dodge, 357 NLRB No. 183, slip op. at 21 (2012), and cases cited there. However, this rule only applies if the employees were adversely affected in some "material, substantial, and significant" way. Fresno Bee, supra. See also Rochester Gas & Electric Corp., 355 NLRB 507 (2010), enfd. sub nom. Electrical Workers Local 36 v. NLRB, 706 F.3d 73 (2d Cir. 2013); and EAD Motors, 346 NLRB 1060, 1065 (2006).34 Here, as indicated by the Company, there is no record evidence that the station 2 unit employees were adversely impacted in any way by their relocation to station 3. Thus, no effects bargaining was required. Accordingly, the allegation is dismissed.

2015 NLRB LEXIS 132 (2015)(emphasis added).

General Counsel failed to introduce any evidence that IGT's use of AppleOne had any demonstrable negative impact on bargaining unit members. It is undisputed that there was no loss of work, impact on schedule, or mandatory change to the unit members in any manner, and there is no evidence that any bargaining unit member's position or duties changed because IGT used AppleOne Material Handlers on the Stations Project. To the contrary, the Company met

with the Union prior to the start of the one-time project and made it clear that the unit members had complete control and discretion over whether they wanted to be part of this one-time project, or not, and if so, how they wanted to participate. The evidence showed that while IGT used AppleOne for temporary labor, it used each bargaining unit member to his/her fullest capacity, including offering overtime every day. Resp. Ex. Deloach-Perea, Tr. 164:13-18, 172:18-19, Tr. 174:4-6 ("Overtime is always offered. We always have work to do in Las Vegas. Always. Every day.") As importantly, there is no evidence that a bargaining unit member was replaced by or lost hours or wages to an AppleOne temporary laborer, or that a bargaining unit member lost benefits because IGT used AppleOne on the Stations Project.[27] In fact, in response to the Judge's questions, Robles expressly conceded that he did not lose any wages by not working full time on the Stations Project. Robles, Tr. 409:6-12.

Because the decision to use a vendor's labor on this one-time project was not based on labor costs, and the decision does not have material, substantial or significant impact on the terms and conditions of the unit members' employment, the Company was not obligated to bargain over the decision to use AppleOne Material Handlers instead of hiring additional temporary employees on the Stations Project, or about the effects on the bargaining unit.

3. General Counsel Failed To Establish That IGT Failed To Bargain With the Union Over The Use Of AppleOne For Temporary Labor.

Assuming *arguendo* that IGT had a duty to bargain over the effects of the use of temporary AppleOne Material Handlers on the bargaining unit, the claim still must dismissed because the evidence shows that IGT did in fact bargain with the Union on this issue in good

[27] General Counsel may try to argue that West testified he was denied overtime because temporary laborers were working the Stations Project, but such a characterization is incorrect. West testified that he went to the Green Valley Ranch Casino to work overtime and was told "I wasn't really needed and I could -- I could hang out and observe to understand the system if I needed to, but I didn't see a purpose to do so." Tr. 420:2-7. He further testified that he decided to leave instead of staying to learn and understand the system. Tr. 420:8-10. In other words, West was not denied overtime. Instead, he chose not to accept it because he did not see the need to stay and learn the system.

faith on multiple occasions.

In *Atlanta Hilton & Tower* the Board explained the Union's and IGT's duty to bargain as follows:

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment .... **but such obligation does not compel either party to agree to a proposal or require the making of a concession**." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement."

Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984) (citation omitted, emphasis added). The Board further explained:

> "[T]he Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." The employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all."

Id. (citations omitted).

To determine whether an employer failed to bargain in good faith, the Board will consider the employer's overall conduct from which "it must be decided wither the employer is lawfully engaging in hard bargaining … or unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Id.* (citation omitted). In this regard, an employer's firm stance on a position does not amount to a refusal to bargain in good faith. *Id.* (citation omitted).

Here, although IGT maintained a firm position that it would not hire temporary employees for a temporary project, the evidence shows it was otherwise open to discussing any other proposals with the Union. IGT met with the Union in person on March 17 and May 4. The parties exchanged numerous emails on the subject, and the Union requested and IGT provided information about temporary labor. *Id.* IGT expressly invited the Union, several times, to present proposals for IGT's consideration, and specifically wrote on numerous occasions in connection with the Stations Project that it stood ready to bargain over anything regarding the

terms and conditions of the bargaining unit's employment. Resp. Ex. 7.[28]

On May 4th, the Union raised several issues during this meeting about: (1) AppleOne laborers wearing IGT t-shirts; (2) the desire that IGT distribute special event technicians' work schedules more than 24 hours in advance; and (3) having two bargaining unit members work as leads on the Stations Project. IGT responded to each issue: (1) IGT explained that Stations required the wearing of shirts for security and offered to have IGT employees wear new t-shirts and to have the temporary laborers wear older styled t-shirts; The Union agreed to this compromise; (2) IGT explained why it provided those schedules with short notice, and committed to trying to get more notice (as of the hearing IGT had increased the notice from 24 hours to one-week); and (3) IGT explained that it already had two bargaining unit members working as leads on the Stations Project. The parties discussed again IGT's desire to use the bargaining unit members to their full capacity, including overtime. Finally, the meeting concluded with the Union committing to speak with the bargaining unit members and to present a written proposal about the use of temporary labor for IGT to consider.

On May 19, 2016, IGT finally received a proposed letter of understanding from the Union. Resp. Ex. 12. Unfortunately, it was nothing more than another proposal for IGT to hire temporary employees from the hiring hall before IGT could use temporary labor.[29] Soto tried to avoid this fact during cross examination. However, he ultimately conceded the proposal required IGT to hire temporary employees.

> Q: So even though for two months the Company -- the Union was aware that the Company had notified them that we were not going to hire anybody on this

[28] Indeed, the last email introduced from Hartman to Soto on May 23, 2016 again offered, "If you would like to discuss a proposal regarding the terms and conditions of the bargaining unit, we stand ready to negotiate in good faith." Resp. Ex. 14.

[29] Offering a proposal that is predictably unacceptable can be bad faith bargaining when the offering party has an inflexible attitude and fails to present reasonable alternatives. *See e.g. NLRB v. Wright Motors*, 603 F.2d 605 (7th Cir. 1979); *Brownsboro Hills Nursing Home*, 244 NLRB 269 (1979); and *Kmart Corp.*, 242 NLRB 855 (1979).

temporary project your first proposal in point one was to hire employees on the project, correct?

A: If once the bargaining unit has been fully utilized and we couldn't furnish any qualified employees then but we -- it's not -- we're not asking for you to hire. We never -- I don't believe we were asking for you to hire more people. We were just trying to help you suffice so that you could have temporary employees to do the work.

Q: But the temporary employees were going to be our hires, correct?

A: Well, yes.

Q: **Right. So your proposal number one was for the Company to hire temporary people, correct?**

A: **Yes**

Soto, Tr. 343:17 - 344:8.

Other than the proposal to hire temporary employees, the Union chose not to make any other proposal regarding the terms and conditions of the bargaining unit's employment, even though Soto testified that he was aware of other proposals that he could have made, buut chose not to.[30] Further, Soto's excuse that he had not been provided with information he requested, and therefore was unable to make any proposals, is false and completely undermined and refuted by Resp. Exs 2-4 which reflects that all of Soto's requests being responded to in a timely fashion. As such, in totality, the record, including the testimony of the meetings and the emails, demonstrate that IGT bargained with the Union in good faith about the Stations Project.

Thus, based on the reasons presented above, the GC's claim that IGT violated the Act as it relates to supplementing the bargaining unit employees by using AppleOne Material Handlers on the Stations Project should be dismissed.

[30] In this regard, as it is undisputed that Hartman sent repeated emails to the Union offering to bargain with the Union over any proposal about the terms and conditions of the bargaining unit's employment, by conceding that the Union was simply choosing not to make any additional proposals to the Company, an additional defense to the Consolidated Complaint is that that the Union has waived its right to bargain over the Stations Project.

C. General Counsel Failed To Establish That The Non-Disparagement Language In IGT's Separation Agreement Violates The Act.

General Counsel claims that IGT violated Section 8(a)(1) of the Act by maintaining non-disparagement language in a separation agreement, which allegedly interfered with, restrained, and coerced IGT's employees in the exercise of their Section 7 rights. Compl. ¶¶ 5 & 7. With respect to the alleged Separation Agreement, the Complaint states:

> Since about June 30, 2015, Respondent has maintained the following overly-broad provision in its Separation Agreement and General Release:
>
> You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT.

Compl. ¶ 5.

This claim must be dismissed because, (1) the undisputed evidence shows that IGT does not provide its separation agreement to employees, and there is no record evidence that any employee of IGT ever saw the agreement, and (2) IGT's current Separation Agreement uses non-disparagement language which the Board has held does not interfere with an employee's Section 7 rights.

1. The Non-Disparagement Clause Does Not Violate The Act.

To the extent that the claim is not time-barred, the claim must be dismissed because the Separation Agreement was not provided to any employees who are covered by the Act. Indeed, General Counsel failed to present any evidence that any employee of IGT ever saw a copy (or was even aware of the existence) of the Separation Agreement. To prove a rule or policy is unlawfully overbroad General Counsel must prove that "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004).

However, no "employee" could construe the Separation Agreement as restricting the exercise of Section 7 rights as the record evidence fails to establish that the agreement was given to any employee, or that any employee ever saw the agreement, and the non-disparagement language in the current Separation Agreement is lawful under the Board's decision in *Pratt, LLC*, 360 NLRB No. 48, p. 21 (2014).

a. IGT Does Not Provide Its Separation Agreement To Employees And The Record Evidence Has Not Established That Any Employee Has Ever Seen The Separation Agreement.

The allegations relating to the Separation Agreement must be dismissed because no "employee" would have reasonably construed the language to prohibit Section 7 activity. Indeed, a finding that a company could not enter into a voluntary non-disparagement agreement with a third-party, for consideration, is unprecedented.[31] Section 7 of the Act only protects **employees'** rights to engage in concerted activity and Section 8 of the Act prohibits an employer from restricting its **employees'** Section 7 rights. Section 7 and Section 8 do not provide protection for non-employees.

Once an employee ceases to be employed (under lawful circumstances), he/she is no longer covered by the Act's terms, whether he/she is terminated or quits. *See, e.g., Veouvie Foods,* 321 NLRB 328, 344 (1996)(employee was not an employee of employer where not on the payroll, and has no wages); *Model A & Model T Mtr Co.*, 259 NLRB 555, 568 (1981); *S.B. Thomas, Inc.,* 256 NLRB 791, 793 (1981)(laid off employees with no demonstrated reasonable

[31] For purposes of the law, a former employees who has lawfully separated from the company has no different status than any other third-party in the marketplace.

expectancy of recall are non-employees).[32] Similarly, the Supreme Court observed in *NLRB v. Town & Country*, 516 U.S. 85, 90 (1995), an employee under the Act is generally a person who works for another in return for financial or other compensation; the dictionary definition of employee applies to section 2(3) of the Act.[33] Thus, as Doti's testimony established that the Separation Agreement was not given to any employee of IGT, a violation cannot be found regarding its non-disagreement clause as it relates to anyone who received the agreement.

Similarly, the GC has failed to support any argument that the Separation Agreement should be found unlawful because an employee of IGT may become aware of it. In fact, there is no testimony in the record that any employee of IGT, under any circumstances, has ever seen or become aware of the Separation Agreement, or the contents therein. As such, the record is devoid of a single supporting fact that one of IGT employee's Section 7 rights could be restricted as a result of the Separation Agreement, or that any employees could reasonably construe the language of the non-disparagement clause in the Separation Agreement to prohibit Section 7 rights. [34]

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[32] *See also E. Mishands' Sons*, 242 NLRB 1344, 1353 (1979)(after employee quit, and there was no constructive discharge, the individual is not considered an "employee" of the company under the Act); *Polson Ind.*, 242 NLRB 1210 (1979)(employee who quit is not an employee and entitled to *Weingarten* representative at reinstatement interview, even though he was an "employee applicant" under Section 2(3)); *Talladega Foundry & Mach. Co.*, 122 NLRB 125, 127 (1958)(employee hired for personal work of Company official and paid by him has no employee status with Company); *Halstead Metal Prods v. NLRB*, 940 F.2d 66 (4th Cir. 1991); *NLRB v. Texas Nat. Gas Corp.*, 253 F.2d 215 (5th Cir. 1958); *United States IVC. Ind.*, 324 NLRB 8324, 835 (1997)(after employee quits, no relief available).

[33] *See also NLRB v. Steinberg & Co.*, 182 F.2d 850 (5th Cir. 1950) (Congress intended word "employee" to mean someone who works for another for hire); *Allied Chem. Workers v. NLRB*, 404 U.S. 157, 166 (1971)(retirees no longer work for employer for remuneration and are not "employees" under the Act); *WBAI Pacifica*, 328 NLRB 1273 (1999)(unpaid staff not employees since no economic aspect to relationship); *Acrylic Optics Corp.*, 222 NLRB 1105, 1106-07 (1976)(striker lawfully terminated during course of strike has no right to reinstatement at end of strike "following Respondent's lawful nondiscriminatory discharge, [she] lost her status as an "employee" of the Respondent. The fact that she thereafter continued to participate in the strike could not, and did not, serve to restore her "employee" status…)

[34] It is also undisputed that IGT did not promulgate its Separation Agreement in response to union activity. Further, there is no record evidence that the non-disparagement clause was ever enforced. Doti Tr. 198.

b. IGT's Non-Disparagement Language Is Permitted Under Board Law

Moreover, the claim that IGT's non-disparagement provision in the Separation Agreement violates Section 8(a)(1) of the Act must be dismissed because the current non-disparagement language is lawful under Board precedent. In *Pratt* the non-disparagement clause at issue stated:

> Employee agrees that he/she will not make any oral or written statement or engage in conduct that either directly or indirectly disparages, criticizes, defames, or otherwise casts a negative characterization upon Pratt and/ or any Pratt Entity, nor will he/she encourage or assist anyone else to do so. Nothing in this section is intended to prevent Employee from testifying truthfully in any legal proceeding or complying with any lawful subpoena or court order.

Id. at 13.[35] The Board found the employer unlawfully laid off employees and that the non-disparagement provision in their separation agreements was unlawfully overbroad. *Id.* at 21. In explaining why the language was insufficient to save the non-disparagement provision from being unlawfully overbroad the judge explained:

> the non-disparagement clause is not saved from its unlawful breadth by its provision that nothing in the clause is intended to prevent the employee signatory from testifying in a legal proceeding or complying with a subpoena. [Because] **Employees have the right to consult with each other and with their union on employment matters, whether or not those matters lead to court or legal proceedings.**

Id. (emphasis added). In other words, the clause would have been saved if it also explained that it did not interfere with the employees' right to consult with other employees, the union, or anyone, whether or not the matter lead to a legal proceeding.

The Consolidated Complaint is based on an obsolete document. It is undisputed that the non-disparagement provision that IGT has used since January 25, 2016 states:

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[35] *Pratt* is distinguishable from this case because the instant Charge only addresses those employees who have been lawfully separated from the Company, thereby extinguishing any connection as an "employee" of the Company under the Act. Accordingly, *Pratt* did not reach the arguments set forth by IGT *supra*.

> You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT**. <u>Nothing in this clause is intended to prevent you from testifying in a legal proceeding or complying with a subpoena, and nothing is intended to interfere with any of your rights to consult with anyone on employment matters, whether or not those matters lead to court or legal proceedings.</u>**

Resp. Ex. 20 (emphasis added). This provision includes the clause and the language which *Pratt* explained will save an otherwise overbroad non-disparagement provision. Specifically, the language explains that nothing in the provision is intended to interfere with the ex-employee's **<u>rights to consult with anyone about employment matters</u>**, which by its plain definition means the ex-employee can discuss any of the terms and conditions of his former employment with his current co-workers, former co-workers, the Union, or anyone else.

Accordingly, based on the above, the GC's allegation that IGT maintained an unlawful non-disparagement clause in its Separation Agreement must be dismissed.

D. The Amendment To The Complaint Should Be Dismissed Because the General Counsel Cannot Meet The 10(B) Factors Required To Amend The Complaint And The Evidence Contradicts The Amended Claims.

1. The Proposed Amendment

On June 29, 2016, at the start of the hearing and without any prior notice or underlying Charge, the GC proposed an amendment to the Consolidated Complaint to include allegations about IGT's attorney's conduct on May 4, 2016. GC Ex. 1(ac). The proposed amendment added the following allegations to the Consolidated Complaint:

> 5. (b) About May 4, 2016, Respondent, by Respondent's legal counsel, at Respondent's facility, threatened employees with loss of benefits because they engaged in collective bargaining.
>
> [replaced ¶ 6(j) with] 6. (j) About May 4, 2016; Respondent, by Respondent's legal counsel, at Respondent's facility, bypassed the Union and dealt directly with its employees in the Unit by discouraging them from collective-bargaining over terms and conditions of employment.

GCX Ex. 1(ac). *See also* Tr. 7:21-12:24, 128:20-133:6 (discussions about the amendment).

On June 30, the GC presented a second proposed amendment to the Consolidated Complaint. The second proposed amendment added the allegation that "at all material times, the attorney representing Respondent has been an agent of the Respondent within the meaning of Section 2(13) of the Act." GCX Ex. 1(ac).[36] The Second Proposed Amendment inaccurately stated that it was being proposed on June 29th at the start of the hearing – which it was not – and was inaccurately dated as being submitted on June 29th – which it was not.

General Counsel concedes that there was no prior reference to any of the above allegations in the Consolidated Complaint.

2. General Counsel's Motion To Amend Should Be Denied Because The Proposed Amended Claims Violate Section 10(B) Of The Act.

As an initial matter, the GC's Proposed Amendment should be denied for failing to comply with Section 10(b) of the Act. Section 10(b) of the Act requires that a charge alleging a violation of the Act **must be filed** and investigated **before** the General Counsel may file a complaint. Section 10(b) specifically states, "no complaint shall issue based upon any unfair labor practice occurring more than six months **prior to the filing of the charge** with the Board and the service of a copy thereof upon the person against whom such charge is made…" (emphasis added). In other words, there must be a charge before the General Counsel can proceed with a complaint. See *NLRB v. Kohler Co*., 220 F.2d 3, 7 (7th Cir. 1955).

The Board has articulated a narrow exception to this rule: "It has long been held, however, that a complaint may be amended to allege conduct outside the 10(b) period if that conduct took place within 6 months of **a timely filed charge and is 'closely related' to the**

[36] The GC presented no record evidence regarding Gould's status as an agent of IGT, nor any record evidence that Gould was acting as an agent of IGT during the portions of the May 4, 2016 conversation covered by the allegations in the Proposed Amendment.

allegations of that charge." *Smiths Food and Drug Centers, Inc.*, 361 NLRB No. 140, p. 2 (2014) (citing *Redd-I, Inc.*, 290 NLRB 1115, 1115 (1998) (emphasis added). To determine whether the proposed amended allegations are closely related to a timely charge, the Board must consider three factors.

> (1) Whether the otherwise untimely allegations involve **the same legal theory** as the allegations in the timely charge;
>
> (2) Whether the otherwise untimely allegations arise from the **same factual situation or sequence of events** as the allegations in the timely charge; **and**
>
> (3) Whether a respondent would raise **the same or similar defenses** to both the otherwise untimely and timely allegations.

Id. (emphasis added).

To prevail on a claim for direct dealing General Counsel must prove:

> (1) that the [employer] was communicating directly with union represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union.

El Paso, Electric Co. 355 NLRB 544, 545 (2010) (citations omitted) (emphasis added).

To prevail on a claim that an employer unlawfully threatened bargaining unit members, the General Counsel must prove the employer threatened to reduce or eliminate an employment benefit granted to an employee because that employee engaged in protected concerted activity. *See e.g. Bronx Metal Polishing, Co.*, 268 NLRB 887, 888-89 (1984) (employer violated Section 8(a)(1) by threatening to take away employees' vacation benefits if the employees supported the union).

Neither the legal theories to prove the claims in the Consolidated Complaint, or the

defenses thereto, are the same as those related to the claims in the proposed amendment.[37] Similarly, the amended claims do not arise from the same factual scenario or events as those pled in the Consolidated Complaint. The incident in the amendment allegedly happened on May 4, 2016, two weeks after the last charge was filed and after the set of facts which formed the basis for the filed charges.[38] Therefore, the claims in the amendment could not have arisen from the same factual situation or sequence of events as those in the Complaint. *See Carney Hospital*, 350 NLRB 627, 630 (2007) ("Mere chronological coincidence during a union campaign does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign."); and *SKC Electric, Inc*., 350 NLRB 857, 858 (2007) (applying *Carney Hospital*).

Therefore, as demonstrated above, General Counsel has not met his 10(b) burden.

3. General Counsel Failed To Establish Facts That IGT Violated The Act By Directly Dealing With Employees.

Assuming *arguendo* that the new claims are added the Consolidated Complaint, the GC has failed to present evidence supporting the merits of the allegations. To prevail on a claim for direct dealing, the GC must prove (1) that the [employer] was communicating directly with

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[37] Defenses to the request for information claim include that the requested information was not relevant, IGT properly responded to the requests, and the Union never responded to IGT's request for justification that the Union's request was relevant. Defenses to the separation agreement/non-disparagement language claim include that the Separation Agreement was never provided to employees and alternatively, the non-disparagement provision includes limiting language that saves it from being unlawfully over broad. Defenses to the failure to bargain over the use of AppleOne for temporary labor claim include that using AppleOne was not a unilateral change but the status quo and there was no adverse impact to the bargaining unit caused by using AppleOne. These defenses have nothing to do with the defenses applicable to direct dealing or threats. Indeed, the defenses to the direct dealing claim are that no comment was made to a bargaining unit member to the exclusion of the Union and the bargaining unit members were active participants of the Union's bargaining team at the time of the alleged direct dealing. The defenses to the threat claim include that none of the witnesses actually testified that IGT threatened to take away a benefit from any employee because that employee engaged in bargaining, the witnesses do not agree on what was said, and the alleged threat, which was made at the table during bargaining, could be interpreted in a non-threatening way that is consistent with IGT's conduct.

[38] The Consolidated Compliant is the result of four charges filed on December 31, 2015, April 5, 2016, April 13, 2016, and April 20, 2016, alleging that IGT violated the Act by (1) failing to provide information; (2) maintaining an over broad policy; and (3) failing to bargain over an alleged unilateral change.

Union represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *El Paso, Electric Co.* 355 NLRB 544, 545 (2010); *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000). Here, the General Counsel has failed to satisfy the second and third prongs of this standard.

It is undisputed that the communication at issue was not made to the exclusion of the Union, or to otherwise undercut the Union's role as bargaining representative. To the contrary, the conversation in question took place at the bargaining table in the regular course of collective bargaining. The Union's bargaining team included bargaining unit members West and Robles, who attended virtually every bargaining session, and were active participants at the bargaining table on behalf of the Union. Indeed, it is undisputed that throughout these meetings Gould, West, and Robles spoke directly with each other at the bargaining table with the consent of the Union to attempt to resolve issues related to the bargaining unit members. Robles, Tr. 392:12-393:6. West, Tr. 429:11-24.

The allegedly offending incident on May 4, 2016, was a continuation of the same. While there is conflict among the witnesses about the exact details of what was said, every witness agrees that any comment that was made to West or Robles was part of an active conversation with Soto at the bargaining table. There is nothing in the record to support any allegation that Gould spoke to West or Robles outside of the presence of Soto, or that Gould encouraged West or Robles to eliminate Soto from any discussion. To the contrary, the record evidence shows that Gould's alleged comment to West and Robles, at worst, was for the purpose of having Soto continue bargaining on their behalf, and to request that Soto not walk out of the bargaining session, as Soto admits he had just threatened to do.

Moreover, the Union assigned Robles and West to the bargaining committee, and permitted them to interact directly with Gould at the bargaining table on numerous prior occasions. Once the Union conveys that authority on the employee, unless they expressly inform the employer that they have altered the arrangement, any communication within that construct, by definition, cannot be considered direct dealing. *CF Kenosha Auto Transport*, 302 NLRB 888 (1991)(dealing directly with union committeeman to resolve dispute not arising at bargaining table is not direct dealing, nor was discussion in presence of union steward and committeeman a violation; rather, failing to deal with the union's chosen representatives (union official and the steward) in resolving the dispute was a violation).[39]

As there is no record evidence that the Union revoked West or Robles' status as bargaining committee members, or that the Union ever requested that IGT stop talking to Robles or West at the bargaining table (as was the practice at all prior meetings), Gould's alleged communication to West or Robles was not to the exclusion of the Union, and cannot reasonably be considered to undercut the Union.

Accordingly, General Counsel cannot satisfy the evidentiary burden required to support a direct dealing allegation and this claim must be dismissed.

4. General Counsel Failed To Establish That IGT Violated The Act By Threatening To Eliminate A Benefit Because Bargaining Unit Employees Engaged In Collective Bargaining.

Similarly, the allegation that on May 4, 2016, Gould, on behalf of IGT, threatened to eliminate a benefit because bargaining unit members engaged in collective bargaining must be dismissed. To prevail on an unlawful threat claim, General Counsel must prove IGT interfered,

[39] *See also Colorado-Ute*, 295 NLRB 607, 622-23 (1989) (the union steward at one of the covered facilities who was also a member of the bargaining committee, asked the employer to come to the facility and explain its merit wage progression proposal. During that visit she also complained about her most recent increase and explained a variety of things she did of which the President was unaware; he told her to wait until the next merit review and the matter would be considered. No violation of the Act was found). Indeed, the Board has even found

restrained, or coerced employees in the exercise of their Section 7 rights by threatening them with the loss of a benefit because they engaged in protected activity. *Station Casinos, Inc.,* 358 NLRB 637, 643 (2012). "The test for interference, restraint, or coercion is an objective one, and depends on whether the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Id.* (internal quotations omitted, citations omitted).

As an initial matter, the General Counsel cannot not meet his burden when the alleged threatening language cannot be determined because General Counsel's witnesses disagree about what was said. *See N.L.V. Casino Corp.,* 174 NLRB 42, 44 (1969) ("The question thus presented is whether or not the General Counsel has sustained his burden of establishing [the threat that was allegedly made]. In view of the failure of the General Counsel's witness to agree on what was said at the meeting, I find that he has not sustained his burden."). Here, there is conflict among the witnesses who testified about the May 4 conversation as to what was said by Gould, and to whom he said it. Of the three witnesses, Soto testified that Gould spoke directly to West and Robles, Robles testified that Gould spoke directly to Soto, and West ultimately said he did not remember the exact words Gould used but seemed to indicate he was speaking to West and Robles. Soto, Tr. 222:11-13, 332:21-23, 333:4-8. Robles, Tr. 390:15-25. West, Tr. 425:5-11.

Moreover, although each statement alleged by the witnesses was different, none of General Counsel's witnesses testified that Gould threatened that IGT would take away, reduce, or alter the employees' overtime benefits for any reason, and certainly not because bargaining unit members were engaged in collective bargaining. To the contrary, as Robles testified, the topic of the conversation was trying to determine how to get the bargaining unit as much work and overtime as possible on the Stations Project. Robles, Tr. 402:14-403:3. It is undisputed that

Gould's alleged comment was in response to Soto's declaration that he was going to end the discussion, which had become "heated." Soto, Tr. 221-22. Every varying version of Gould's comment ultimately echoed the same sentiment – that overtime could be lost because Soto was going to walk away from the bargaining table – not IGT.[40]

In fact, Gould's words were undisputedly geared towards trying to continue bargaining with the Union, which in fact was accomplished as all the witnesses testified that the Parties immediately took a caucus, calmed down, and then returned to the table and continued to bargain, ultimately agreeing on one item. The Board has held that when an employer's conduct after allegedly "threatening" statements is consistent with a non-threatening interpretation of the statement, then such conduct is evidence that the alleged statement was not an unlawful threat. *See Mantrose-Haeuser Company*, 306 NLRB 377 (1992) (finding that the employer's statement that "wage and benefit programs typically remain frozen until changed, if at all by a contract" was not a threat to freeze or reduce wages and benefits but an explanation that wages and benefits would not change was supported by employer's post statement conduct including maintaining the status quo).

Ultimately, no person could construe the record evidence as a statement that IGT would take away overtime, and certainly not "because" the bargaining unit engaged in collective bargaining. As such, none of the testimony about the alleged "threat" satisfies the General Counsel's burden to prove that Gould's alleged statement "would reasonably have a tendency to interfere with the free exercise of employee rights under the Act".

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[40] As a factual matter, the potential cause and effect of Soto's threat to end the meeting on May 4 remains true. The Stations Project was actively going on at the time. IGT was trying to confirm with Soto that no one was missing out on any overtime – a concern Soto had raised in an earlier email. While it ultimately proved untrue that anyone was missing out on overtime, hypothetically, if that had been the case, and Soto had carried out his threat and ended the bargaining session about overtime prematurely, Soto would have potentially caused the bargaining unit to lose overtime. However, under no circumstances would IGT have caused the bargaining unit to lose any benefit, such as overtime, and certainly not because they engaged in collective bargaining as alleged by the GC.

IV. CONCLUSION

Based on the foregoing, IGT respectfully submits that the General Counsel failed to meet his burden of proof and the claims should be dismissed.

Dated: August 10, 2016

s/TEG

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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in IGT d/b/a INTERNATIONAL GAME TECHNOLOGY, Cases 28-CA-166915, et al. was served via E-Gov, E-Filing, and E-Mail, on this 10th day of August 2016, on the following:

Via E-Gov, E-Filing:

Honorable Jeffrey D. Wedekind
Administrative Law Judge
NLRB – Division of Judges
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